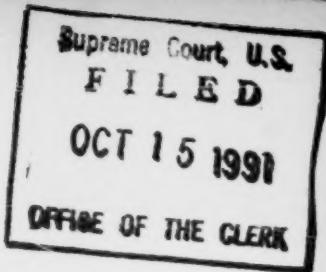


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91-632



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

LOIS MILLSPAUGH and TINA DYSON,
Petitioners

v.

COUNTY DEPARTMENT OF PUBLIC WELFARE
OF WABASH COUNTY, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether parental custody and choice in matters of family life are clearly established rights protected by the Fourteenth Amendment and Title IV-E of the Social Security Act enforceable under 42 U.S.C. 1983.

Whether a welfare caseworker has absolute immunity from liability under 42 U.S.C. 1983 for damages resulting from (1) using a series of ex parte judicial hearings to procure Court orders to remove and detain children without service of process or notice to the Mothers, and (2) withholding material evidence from the Court to prevent the Court from ordering the children returned to their Mothers.

Whether a welfare caseworker acts in an objectively reasonable manner by knowingly



using an affidavit that contains false statements of material fact, statements for which there are no known supporting facts, and bare conclusions, to obtain an ex parte Court order to take children from their Mothers in order to complete an investigation to determine whether the children should remain in their Mothers' custody.

Whether the actions of a local welfare department director, who by statute possesses of the powers of the Department, can establish Department policy, custom or practice sufficient to impose liability on the Department for violations of 42 U.S.C. 1983.

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TABLE OF CONTENTS

Questions Presented For Review	1
Table of Contents	3
Table of Authorities	4
Introduction	6
Opinions Below	6
Jurisdictional Grounds	6
Constitutional And Statutory Provisions	8
Statement Of The Case	12
Reasons Relied On For The Allowance Of The Writ	22



TABLE OF AUTHORITIES

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Austin v. Borel, 830 Fed2d 1356 (3rd Cir.)
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Babcock v. Taylor, 884 Fed2d 497 (9th Cir.)
1989 cert denied 110 S.Ct. 1118 (1990)

Brady v. Maryland 373 U.S. 83 (1963)

Chavis v. Rowe 643 F2d 1281 (1981).

Hodorowski v. Ray, 884 Fed2d 1210 (5th Cir.) 1988

Illinois v. Gates 462 U.S. 213 (1983)

J.H.H. v. O'Hara, 878 Fed2d 240 (8th Cir.)
1989 110 S.Ct. 1117 (1990)

Maine v. Thiboutot (1980) 448 U.S. 1, .

Malley v. Briggs 475 U.S. 335 (1986)

Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247

Owen v. Sidias Independence (1980) 452 U.S. 622

Pembaur v. Cincinnati (1986) 475 U.S. 469

Smith v. Organization of Foster Families
(1977) 431 U.S. 816

U.S. v. Agurs 427 U.S. 97 (1976).



STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I

U.S. Const. Amend. IV

U.S. Const. Amend. XIV

28 U.S.C. Section 1254(1)

42 U.S.C. Section 671

42 U.S.C. Section 671(a) (3), (15), (16)

42 U.S.C. Section 675

42 U.S.C. Section 1983

Indiana Code 12-1-4-1



INTRODUCTION

Lois Millspaugh, Tina Dyson and respectfully pray this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, reported at 937 F.2d 1172, is reproduced in Appendix, page 2.

The unpublished Memorandum and Order of the United States District Court for the Northern District of Indiana, dated July 31, 1990, is reproduced in Appendix, page 24.

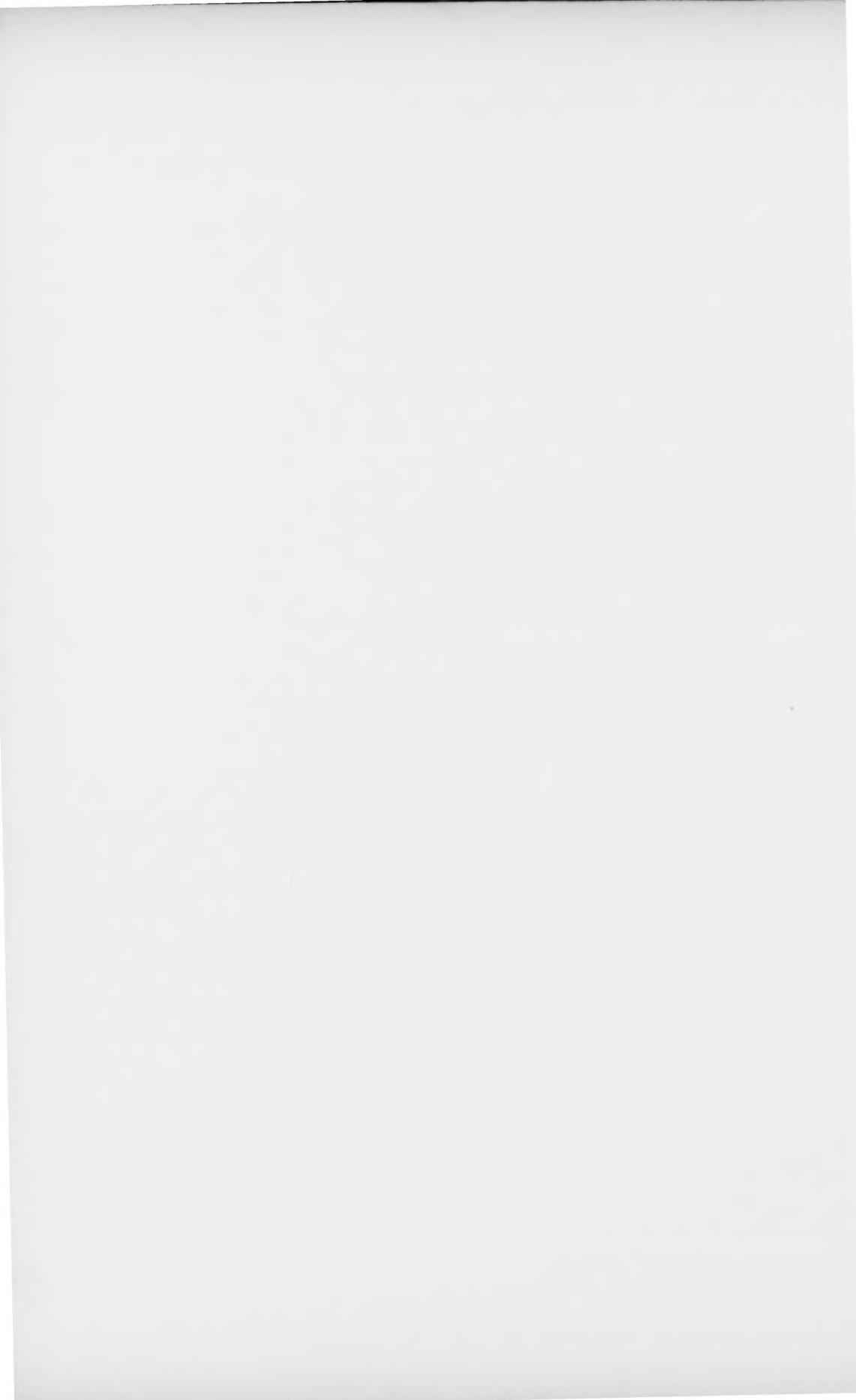
JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 15,



1991. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be



seized.

United States Constitution, Amendment 14,
Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42:

Section 1983. Civil Action for Deprivation of Rights.



Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code, Title 42:

Section 671. State Plan for Foster Care and Adoption Assistance.



See Appendix, p. 106.

United States Code, Title 42:

Section 675. Definitions.

See Appendix, p. 117.

Indiana Code 12-1-4-1: Powers and Duties;
Exercise of Powers.

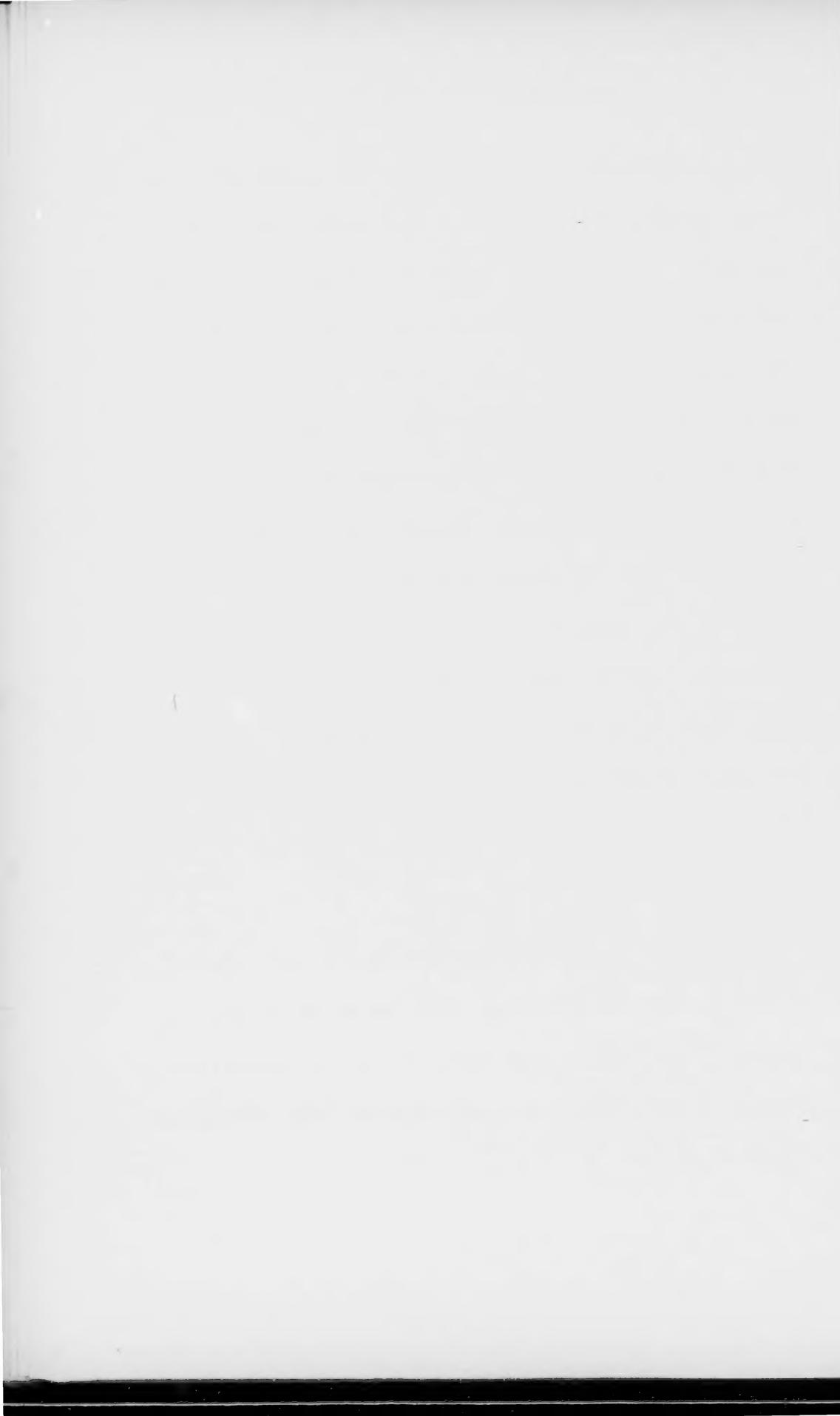
See Appendix, p. 124.



STATEMENT OF THE CASE

Since October, 1982, Lois Millspaugh and Tina Dyson, hereinafter Mothers, and their children lived in a home in Wabash, Indiana with 3 other members of Faith Ministries, a religious group that lived by faith and believed God would provide for their needs. The Wabash County Department of Public Welfare, hereinafter Department, had been watching the Mothers and children for over a year. The children attended public schools, were excellent students, always had sufficient food and never had any serious physical problems because of lack of food, medical attention, shelter, education or supervision.

In January, 1984 the members of Faith Ministries, believing God wanted them to remodel the home and embark on a religious mission, employed a contractor who removed



everything in the home. When the cooking facilities were removed, the group, including the Mothers and children, moved to a motel-restaurant in Wabash. A few days later they left Wabash on their religious mission.

Caseworker Manetta Tucker and the Department Director received an anonymous report that the Mothers had given away their possessions and the children had no food. Tucker and the Department Director determined the Mothers had removed the children from school, traveled to Kokomo where they were given food, shelter and money, and then to the Indianapolis home of the daughter of one of the group's members. They looked in the windows of the home the group had left and saw everything had been removed.



Tucker, with the help and approval of the Department Director, used an affidavit they knew contained false statements of material fact and unsupported conclusions to obtain an ex parte court order to remove the children. The affidavit alleged the Mothers and the children were at a church in Kokomo with no food or money, the Mothers were mentally incapable of caring for the children, and that the children's physical or mental condition was seriously impaired or seriously in danger because of the actions of the Mothers. Tucker admits the children were removed because Tucker and the Department Director were "concerned", "weren't sure", and were "questioning and wondering." Tucker admits there was not enough information to determine if the Mothers could provide for the children, no-one had asked if the Mothers could get money or if shelter was available, no-one

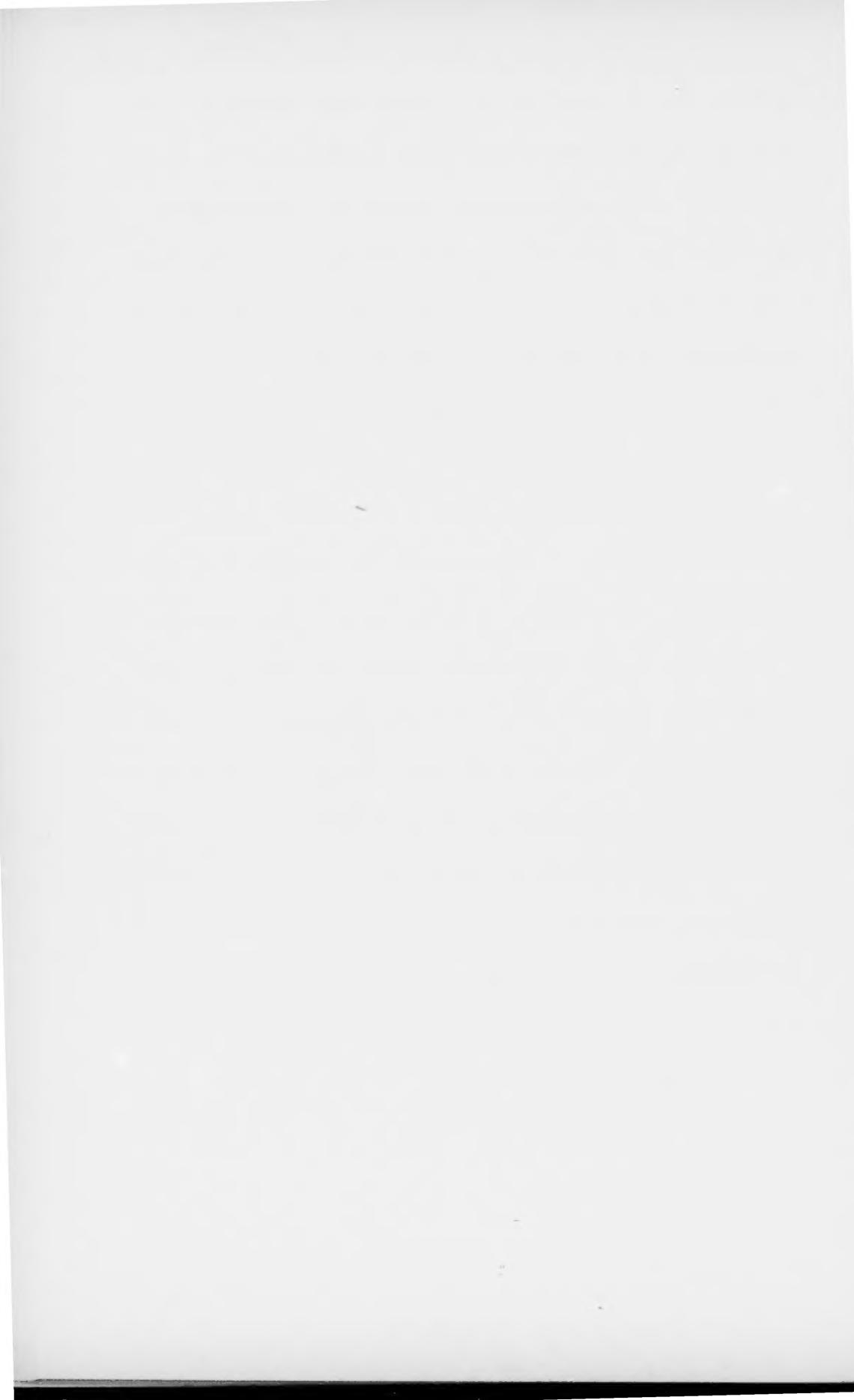
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believed the children's physical health was seriously in danger, there was nothing to suggest the children had any mental injury, there was no information the children had suffered any physical injury, there was no information it would be harmful for the children to travel with their Mothers, and there was no information the children's physical condition was seriously impaired or endangered. State law, promulgated in compliance with Title IV-E of the Social Security Act [42 U.S.C. 671(A)(15)], only permitted removal of the children without notice and hearing if there was probable cause to believe the children had suffered mental or physical injury, or if their physical or mental condition was seriously impaired or endangered.

After the children had been taken from the Mothers, the Department and Tucker partici-



pated in a series of hearings before the state court involving the continued detention of the children without service of process or notice to the Mothers. Shortly after Tucker took the children from their Mothers, the children were examined by a physician and psychologist who pronounced them healthy and free of emotional or psychological problems. Tucker and the Department never informed the Court of any of these reports. Tucker and the Department knew the Mothers lived by faith and were traveling on a religious mission, but refused to allow the children to travel with them or return the children to them unless they abandoned their religious mission, returned to Wabash, got a job and submitted to a psychiatric evaluation and/or counseling. Tucker admits she would allow the Mothers to live by faith and



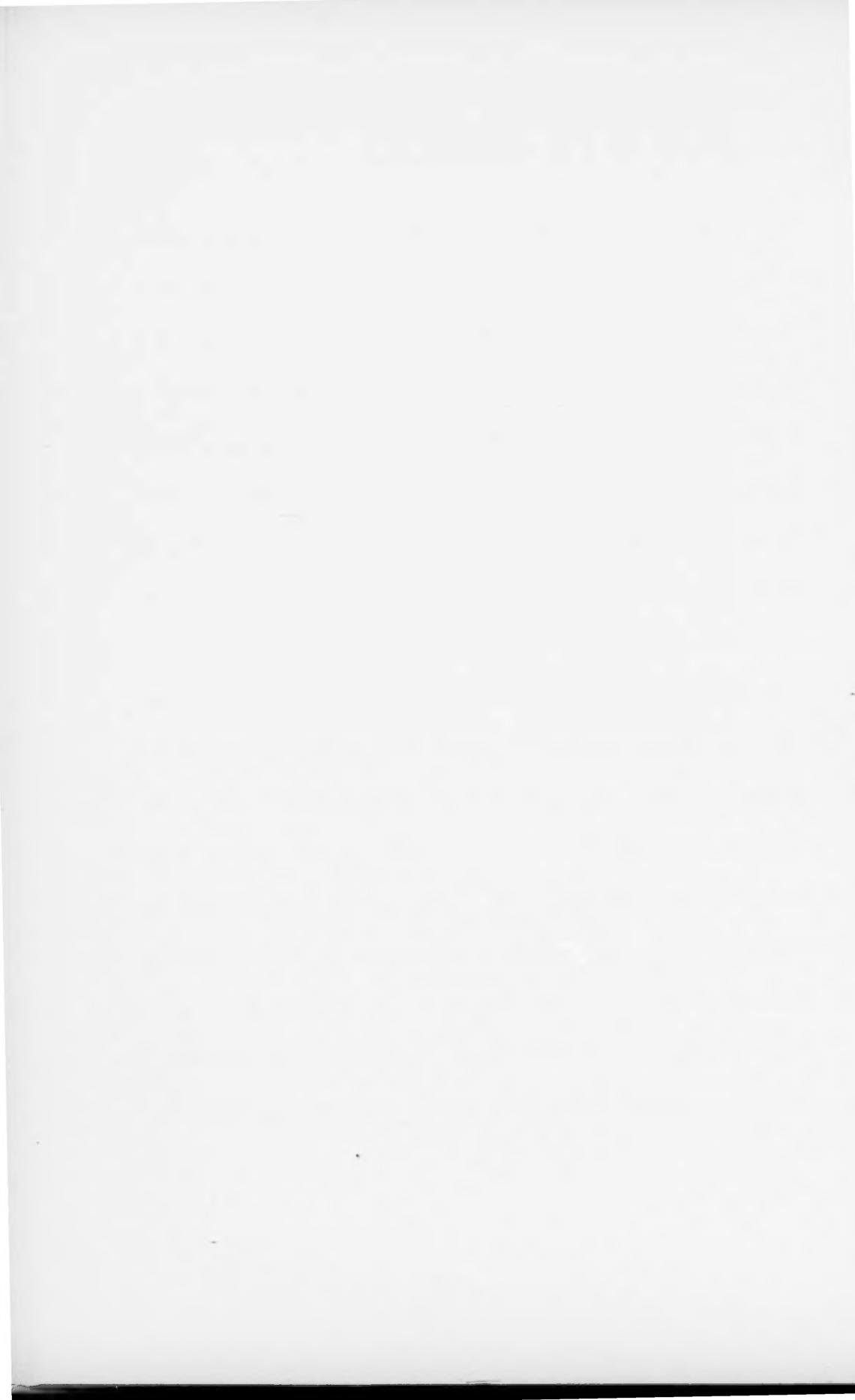
depend on God to provide only if they could provide her with the names and addresses God was going to use to provide so she could check them out. Tucker also admits the Department refused to allow two of the children to attend a religious meeting because they wanted the children to question the religious beliefs their Mothers had taught them. The state court ultimately ruled the Mothers' constitutional rights had been violated because they had not been properly served with process, set aside its earlier findings, and, after hearing evidence, found the children were not in need of services and ordered them returned.

Indiana law gave the Department Director all of the rights, powers and duties of the Department. The attorney for the Department approved the petition that was filed with the Court to obtain the order to

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take the children, and prosecuted the case on behalf of the Department.

On January 31, 1986 the Mothers filed their complaints under 42 U.S.C. 1983 against Tucker and the Department in the United States District Court for the Northern District of Indiana. Amended complaints under 42 U.S.C. 1983 and Title IV-E of the Social Security Act were filed. Jurisdiction of the District Court was based on 28 U.S.C. 1331 and 1343, by reason of the claims being actions brought to redress the deprivation under color of law, statute, regulation, custom, and the usage of the State of Indiana, of rights, privileges and immunities secured by the laws and Constitution of the United States, particularly Title IV-E of the Social Security Act and the First, Fourth and Fourteenth amendments. The complaints alleged violations



of the First, Fourth, and Fourteenth Amendment and Title IV-E of the Social Security Act, that the children had been unlawfully taken from the Mothers because the Court orders by which they were taken were constitutionally deficient in that the affidavits submitted in support of the applications for the orders did not set forth sufficient facts to establish probable cause to believe the children had suffered mental or physical injury or that their physical or mental condition was seriously impaired or in danger, that taking the children interfered with the free exercise of the mother's religion, that reasonable efforts were not taken to prevent or eliminate the need to remove the children, and that reasonable efforts were not taken to return the children as required by Title IV-E of the Social Security Act.



On August 1, 1990 the District Court granted summary judgment to the Department and Tucker dismissing all claims of the Mothers on the basis that no clearly established rights of the Mothers had been violated, that Tucker's conduct was reasonable, and that the actions of Tucker and the Department Director were not according to any established Department policy, custom or practice.

The Court of Appeals for the Seventh Circuit affirmed the District Court, deciding that the Mothers' rights had not been violated by any unconstitutional rule or policy of the Department, that Tucker had absolute immunity for the steps taken by her to present the case for decision to the state court because they were prosecutorial actions, and that the remainder of Tucker's



actions were protected by qualified immunity because she had an objectively reasonable basis for them.



REASONS RELIED ON FOR THE ALLOWANCE
OF THE WRIT

A writ of certiorari should be granted in this case because the decision of the Court of Appeals permits a welfare caseworker and a county department of public welfare to remove children from their Mothers without probable cause, in violation of Title IV-E of the Social Security Act, and then to deprive the Mothers of the liberties by participating in a series of judicial proceedings without service of process or notice.

A writ of certiorari should be granted in this case to resolve the question of whether parental custody and choice in matters of family life are clearly established rights protected by the Fourteenth Amendment and Title IV-E of the Social Security Act enforceable under 42 U.S.C. 1983. This

Court held in Smith v. Organization of Foster Families (1977) 431 U.S. 816 that the rights of parents to make personal choices in matters of family life are liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Title IV-E requires the child welfare systems of the state use reasonable efforts prior to the placement of a child in foster care to prevent or eliminate the need for removal of the child from his home, and use reasonable efforts to make it possible for the child to return to his home. 42 U.S.C. 671(a)(3), (15), and (16). In Maine v. Thiboutot (1980) 448 U.S. 1, this Court held that the various provisions of the Social Security Act were enforceable under 42 U.S.C. 1983. The purpose of IV-E is to assure to citizens certain minimal rights and protections and guarantees that, when local governing units take action in areas

involving both the welfare of children and the family rights of parents, those governing units follow certain procedures, guidelines and steps which the Congress has determined are needed in order to assure that the actions taken are in fact in the best interest of both.

The Court of Appeals correctly concluded that Tucker had ample basis for taking the initial steps "to determine" whether the children should remain in their mother's custody, however, that was not all that was done in this case. Before the children could be removed without notice and hearing, state law, promulgated in compliance with Title IV-E, required probable cause to believe that the children had suffered mental or physical injury or that their physical or mental condition was seriously impaired or endangered. Tucker has admit-

ted that no one believed the children's physical health was in serious danger, there was nothing to suggest that the children had mental injury, there was no information that the children had suffered any physical injury, there was no information that it would be harmful for the children to travel with their Mother's, and there was no information that children's physical condition was seriously impaired or endangered. Tucker's admissions are contrary to the conclusion of the Court of Appeals that Tucker had probable cause to believe these necessary elements actually existed.

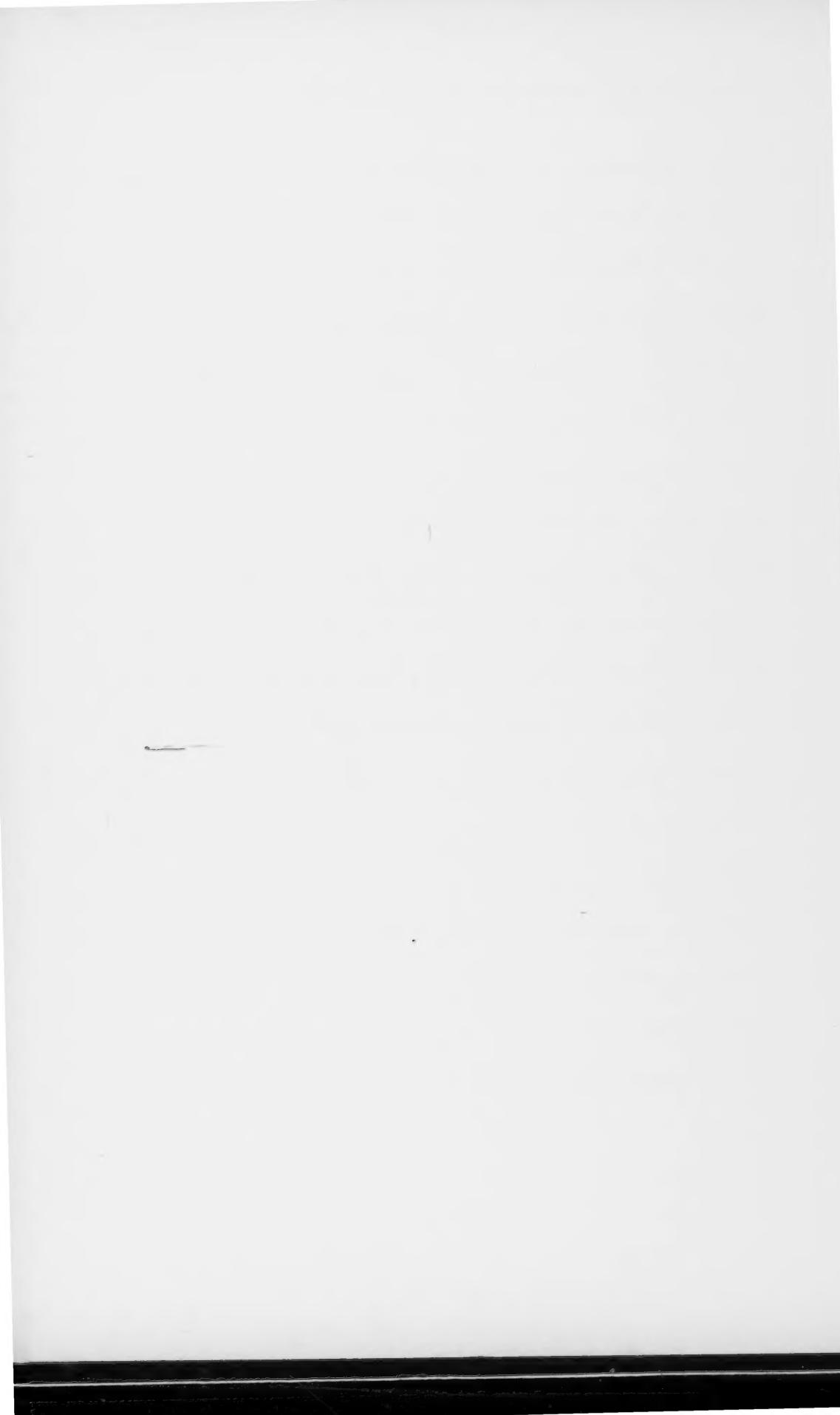
The decision of the Court of Appeals gives a welfare caseworker the right knowingly to use an affidavit that contains false statements of material fact, statements for which there are no known supporting facts,

and mere conclusions, to obtain an ex parte court order to remove children without liability for damages under 42 U.S.C. 1983. That decision is in conflict with this Court's decision in Malley v. Briggs 475 U.S. 335 (1986) that a government official must possess sufficient reliable facts from which to conclude that probable cause existed in fact and present those facts by oath or affirmation to a Court in a manner from which a neutral and detached magistrate could make an independent determination that the facts as presented were sufficient to constitute probable cause, and with this Court's decision in Illinois v. Gates 462 U.S. 213 (1983) that information from anonymous or unidentified sources may not be considered in establishing probable cause without supporting or corroborating evidence and that conclusory



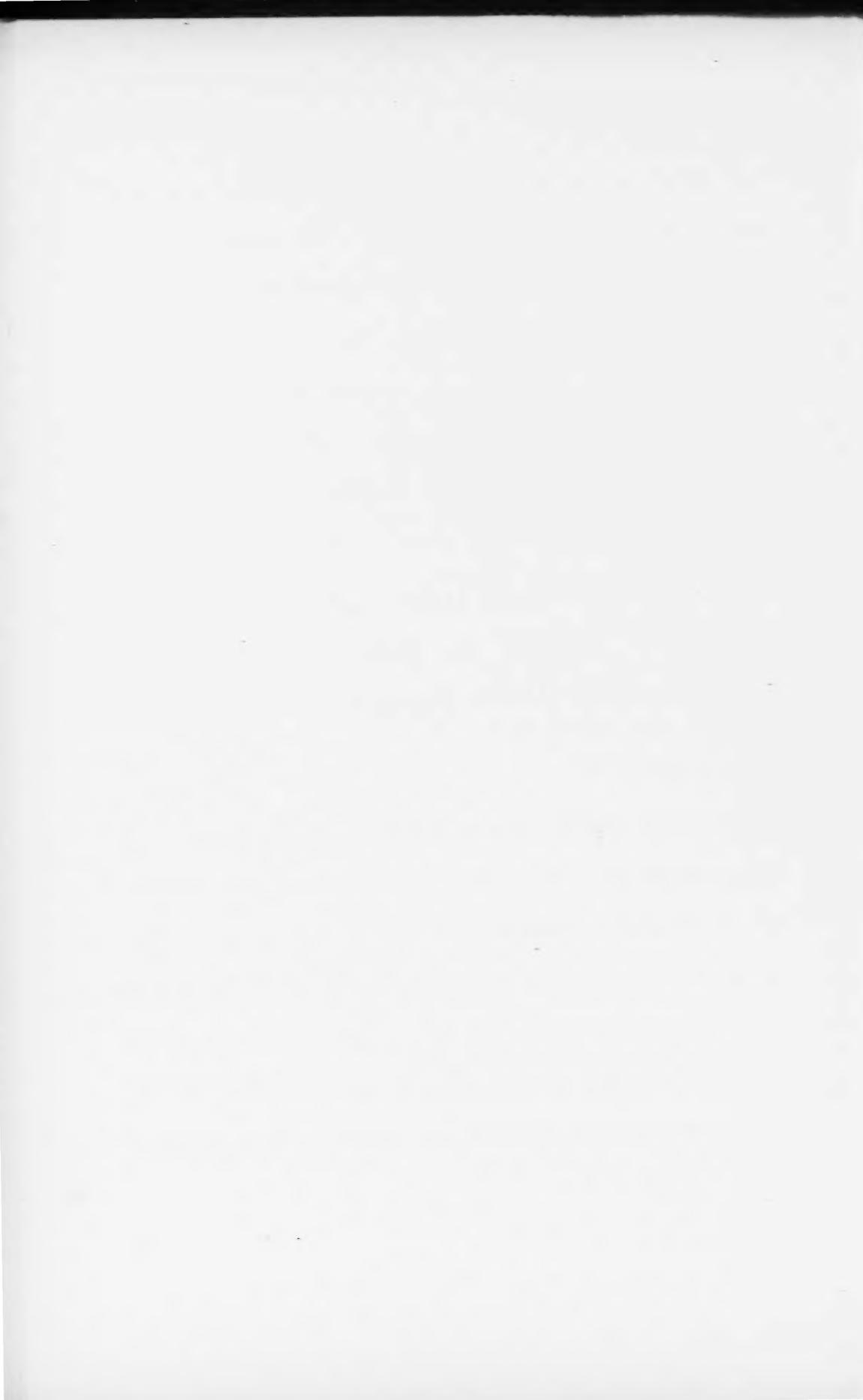
statements must be disregarded.

The decision of the Court of Appeals that the Mothers have not identified an unconstitutional policy or rule of the Department conflicts with the decision of this Court in Pembaur v. Cincinnati (1986) 475 U.S. 469 which held that governmental liability under 42 U.S.C. 1983 attaches where a deliberate choice to follow a course of action is made by the government official responsible for establishing final policy with respect to the subject matter in question. The Department Director had final policy-making authority for the Department on all matters because Indiana Code 12-1-4-1 gave the Director all of the rights, powers and duties of the Department. The Director reviewed all of the facts and made the ultimate decision that the caseworker should file the affidavits



used to obtain the order to remove the children, and thereafter continuously reviewed and approved the actions of the caseworker. The Court of Appeals' decision also conflicts with this Court's decisions that unconstitutional government policy, custom or practice may be inferred from a single act or decision taken by a governmental official with policy-making authority. Owen v. Sidias Independence (1980) 452 U.S. 622; Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247; Pembaur v. Cincinnati, supra.

A writ of certiorari should be granted in this case to resolve the question of whether a welfare caseworker has absolute immunity from liability under 42 U.S.C. 1983 for damages resulting from (1) using a series of ex parte judicial hearings to procure court orders to remove and detain



children without service of process or notice to the mothers, and (2) withholding material evidence from a Court to prevent the Court from ordering the children returned to their mothers.

The decision of the Court of Appeals conferring absolute immunity on a welfare caseworker is in conflict with the decisions of other Circuit Courts of Appeals.

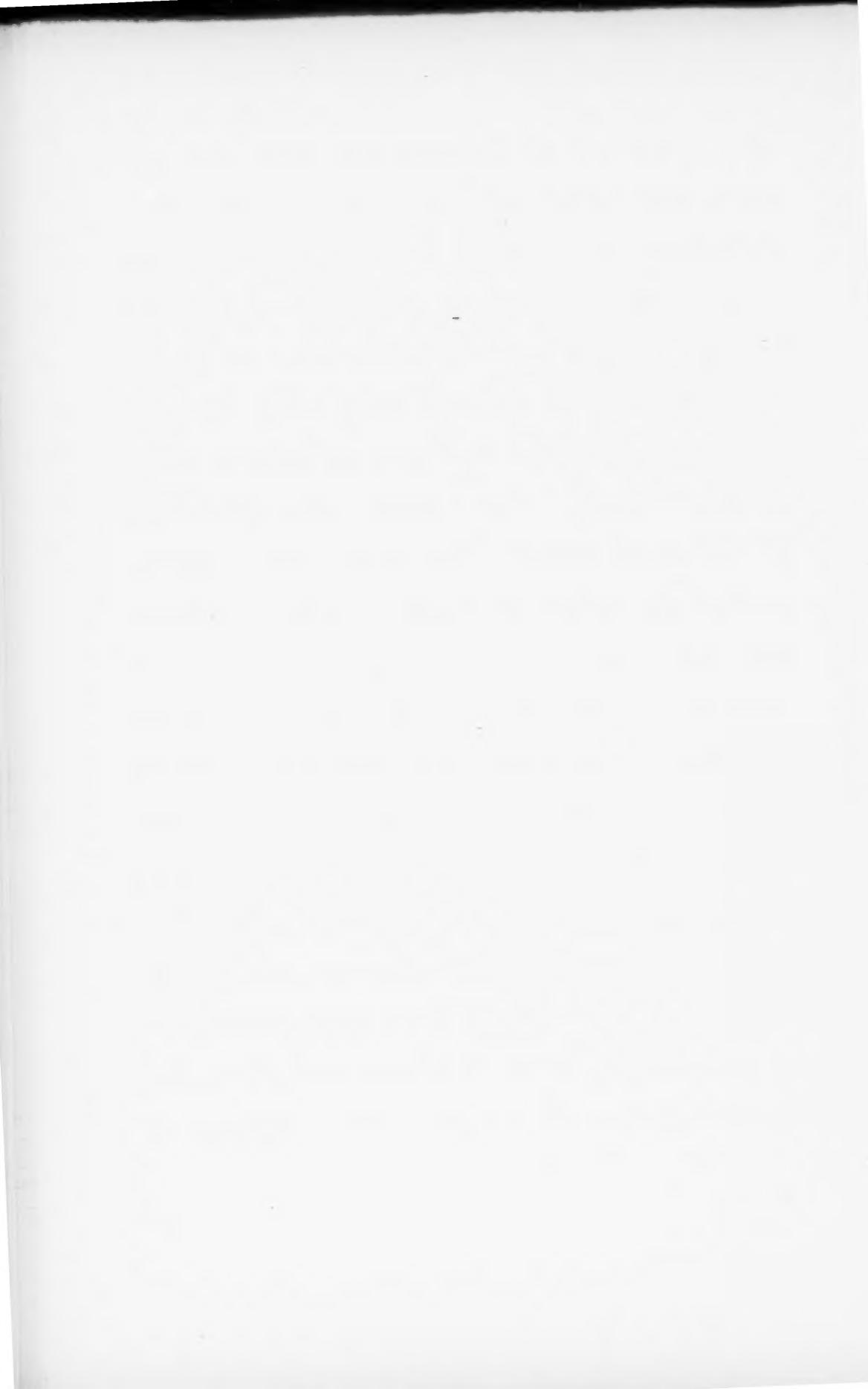
Babcock v. Taylor, 884 Fed2d 497 (9th Cir.) 1989 cert denied 110 S.Ct. 1118 (1990); J.H.H. v. O'Hara, 878 Fed2d 240 (8th Cir.) 1989 110 S.Ct. 1117 (1990); Hodorowski v. Ray, 884 Fed2d 1210 (5th Cir.) 1988; Austin v. Borel, 830 Fed2d 1356 (3rd Cir.) 1987.

The decision of the Court of Appeals that a welfare caseworker is entitled to absolute immunity from liability under 42 U.S.C. 1983 for damages resulting from withholding material evidence from a Court is an impor-



tant question of federal law that has not been, but should be, settled by this Court. Congress, in enacting Title IV-E of the Social Security Act, established as federal policy limits on the instances in which children may be removed from their parents and mandated steps be taken to assure their prompt return. The removal and detention of children demands the same type of safeguards as those afforded criminal Defendants because both involve a deprivation of liberty. The state has a duty to disclose exculpatory material, and failure to do so is a violation of 14th Amendment rights.

Brady v. Maryland 373 U.S. 83 (1963); U.S. v. Agurs 427 U.S. 97 (1976). The 7th Circuit Court of Appeals itself has recognized that a breach of this duty gives rise to an action by a criminal defendant for damages under 42 U.S.C. 1983. Chavis v.



Rowe 643 F2d 1281 (1981). Parents whose children have been taken by the state should have the same rights.

Respectfully submitted by:

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brief